NEOGH SOO OH & ORS.

v.

G. RETHINASAMY

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL SUIT NO. 327/79]
29 APRIL 1983

LEGAL PROFESSION: *Advocate and solicitor - Negligence in discharge of professional duty - Breach of contractual duty - Failure to exercise reasonable care and skill.*

The defendant, an advocate and solicitor, was sued by the plaintiffs for negligence and breach of contractual duty as their solicitor. The defendant had been engaged to act for the plaintiffs in the purchase of a piece of land in 1976. The purpose of the purchase was to build a factory. The land in fact had been acquired by the Government under s. 8 of the Land Acquisition Act. 1960, and the acquisition had been gazetted in a Gazette Notification dated 1 February 1973. The defendant had made a search in the Interim Register but had not made any search at or enquiry with the land office concerned.

Held:

[1] The defendant was liable to compensate his clients for the loss caused by his breach of contractual duty as a solicitor. He had failed in his duty to use reasonable care and skill in not making a search at or an inquiry with the land office concerned.

A client may bring an action against his solicitor in contract, based on the retainer of the solicitor by the client, or in tort, or in both. A solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand. The standard of care is that of the reasonably competent solicitor and duty is directly related to the confines of the retainer. A solicitor should consult with his client on all questions of doubt and keep him reasonably informed. (*Nocton v. Lord Ashburton* [1914 - 15] All ER 45, 54; *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1978] 3 All ER 571, 582 & 611).

[2] The defendant was also liable for negligence. The defendant was a professional man professing special skill and owed a duty of care, quite independent of contract, to person or persons who to his knowledge relied on his skill. (*Midland Bank Trust Co. Ltd. (supra) Hedley Bryne and Company Ltd. v. Heller and Partners Limited* [1963] 2 All ER 575).

[Judgment for the plaintiffs.]

Cases referred to:

Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp [1978] 3 All ER 571
Chin Keow v. Govt. of Malaysia and Anor. [1967] 2 MLJ 45
Whitehouse v. Jordan [1981] 1 All ER 267
Lake v. Bushby & Anor. [1949] 2 All ER 964
Groom v. Crocker [1938] 2 All ER 394
Nocton v. Lord Ashburton [1914 - 15] All ER 45
Hedley Bryne and Company Ltd. v. Heller and Partners Limited [1963] 2 All ER 575

Legislation referred to:

Land Acquisition Act 1960, ss. 4, 8, 9, 10, 23

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol 36 p. 102, para. 138; 4th Edn., Vol. 34, p. 64, para. 77
Phipson on Evidence, 12th Edn., para 314

For the plaintiffs - Ho Sen Feek; M/s. Gan Teik Chee & Ho
For the defendant - Lim Kean Chye; M/s. Lim Kean Chye & Co.

JUDGMENT

Gunn Chit Tuan J:

The defendant, Mr. G. Rethinasamy, an advocate and solicitor practising at Butterworth under the name and style of Rethina and Company, was sued by the plaintiffs abovenamed for negligence and breach of contractual duty as their solicitor.

It was not disputed that on or about 12 June 1976, the plaintiffs consulted the defendant as a solicitor in his office and engaged him to act for them in the purchase of Holding No. 809, Mukim 2, Province Wellesly Central, Penang, (hereinafter referred to as "the said land") from one Haji Hassan bin Abdul Rahman. The defendant prepared a sale agreement that day and the sale was completed on 6 August 1976. It was averred by the plaintiffs in their statement of claim and admitted by the defendant in his statement of defence that it was an implied term of the engagement that the defendant "should exercise all due skill and care while acting for the plaintiffs". The said land had in fact been acquired by Government under s. 8 of the Land Acquisition Act, 1960 and the acquisition was gazetted in a Gazette Notification No. 23 dated 1 February 1973. The plaintiffs were awarded and paid sum of RM14,000 in 1977 by the Government for the acquisition of the said land and claimed that they had suffered damages amounting to RM31,000, which sum was arrived at by subtracting the compensation of RM14,000 from the total purchase price of RM45,000 which they had paid for the said land.

It was not denied by the defence that advice on the land acquisitions factor lay within the scope of the defendant's duties as solicitor to the plaintiffs. And it was clear from the evidence adduced in Court that the defendant did not make a search at or enquiry with the Collector of Land Revenue in the Land Office at Bukit Mertajam. He admitted under cross-examination that he was not even aware of the said Gazette Notification No. 23 dated 1 February 1973. On the other hand, one of the plaintiffs Chuah Kay Buan (PW1) who gave evidence in Court said in examination-in-chief, and was not challenged in cross-examination, that the purpose of the purchase of the said land was to build a factory on it and he did ask the defendant if the land was subject to acquisition and his reply was that the "title was clear".

Mr. Lim Kean Chye, Counsel for the defendant, stated that the question for the Court to decide in this case was what would be the standard of skill required from the defendant. He submitted that it would be "the reasonable care and skill to be expected from a normally competent and careful practitioner" *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1978] 3 All ER 571, 582 & 611; *Chin Keow v. Govt. of Malaysia & Anor.* [1967] 2 MLJ 45 and that the extent of the legal duty of a lawyer like the defendant would be a question for the Court to decide. He also submitted that in non-contentious matters it was the solicitor's duty to carry them out according to the regular method prescribed by statute, rule or custom. (36 Halsbury's *Laws of England* (3rd Edn.) p. 102 para. 138). After referring to the following paragraph in Phipson on *Evidence* (12th Edn.) on "Standards of Comparison",

> 314. On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided. To do an act in a customary manner does not, then, necessarily render it justifiable, nor will abstention from a voluntary custom render a party for negligence, unless he has expressly or impliedly invited the injured person to rely on such custom.

Counsel then commented on the evidence of the three plaintiff witnesses who were lawyers in practice. One of them Ms. Lee Jean Khin (PW4) an advocate and solicitor, who is familiar with conveyancing matters in one of the biggest law firms in Penang, said that it was always the practice of her firm to write to the Collector of Land Revenue concerned to make a search or enquiry. Another witness (PW3), who is the present Chairman of the Penang Bar Committee and has been in practice as an advocate and solicitor for 28 years, said that he has in the past made searches by writing letters to various land offices in respect of vacant land. He also said that nowadays there is a special kind of form (Exh. P1) under the Land Rules for such enquiries. However he would not make any search in respect of land in housing estates because one would already be familiar with it. When he was asked what he meant by the word "familiar", he explained that he meant that he would not make a search if he knew what the Government was doing and one was familiar with the history of the land in question including matters such as planning. But he added that if he was acting for someone buying a piece of land in Bukit Mertajam in 1976-1978 he would write to the Collector of Land Revenue concerned. The third solicitor (PW5) who gave evidence for the plaintiffs had also been in private practice for 20 years and said that it was his practice when dealing with land matters to make a search and also make an enquiry with the Collector of Land Revenue concerned except in respect of land in housing estate where there was no likelihood of acquisition.

After referring to the evidence of those three lawyers, Mr. Lim Kean Chye contended that even adopting the tests of those solicitors, the defendant was not wrong not to make a search because he had previously acted for the vendor of the said land at an enquiry when the latter was claiming title by adverse possession. In the course of that enquiry, the settlement officer of the land office concerned was called but not one word was mentioned about the acquisition of the said land. It was the submission of Counsel that in the circumstances of this case and using the tests of those advocates and solicitors called as witnesses by the plaintiffs, it would not have been reasonable that the defendant should have been put on enquiry and gone to the land office ot Bukit Mertajam. He contended that it was enough for him in the circumstances to look at the Interim Register only.

It was the final contention of the Counsel for the defendant that an enquiry at the land office concerned was not even necessary and that the lawyers who had given evidence on behalf of the plaintiffs had ignored the provisions of ss. 9, 10 and 23 of the Land Acquisition Act, 1960, which were what he called "a complete code on the notation of acquisitions". In his opinion by virtue of those sections it was clear beyond doubt that a practitioner need not look beyond the said Register. His arguments were also that it was not the duty of a solicitor to make enquiries on the assumption that Government servants are incompetent or negligent. The defendant's contractual duty in this case he submitted was to see that the purchaser got on the said Register. In this case the defendant did get the plaintiffs on to the said Register as purchasers and they were even issued with the document of title. Counsel submitted that the defendant had therefore completed his part of the contract.

In reply Mr. Ho, Counsel for the plaintiffs, contended that the practice of the lawyers called by the plaintiffs was the practice carried out by almost all conveyancing solicitors here except the incompetent ones. He pointed out that there were normally two steps taken in Government acquisitions of land. Firstly, there was preliminary notice of acquisition of land under s. 4 of the Land Acquisition Act 1960 and secondly there was the declaration under s. 8 of the said Act that land is required for a public purpose. In the case of a notice under s. 4 there was no requirement for its registration with the relevant registering authority but the Collector of Land Revenue concerned would open a file on receiving such a notice. A search or an enquiry with the said Collector of Land Revenue would reveal if there was any notice under s. 4 of the said Act whereas a search at the relevant land registry would definitely not reveal any notice of land acquisition under s. 4. Counsel contended that a solicitor's duty towards his client included finding out for him whether there was any notice under s. 4 of the said Act and to advise him accordingly about the purchase of land. He also submitted that merely making an enquiry with the Registry of Titles alone was not enough and that even if the land had been acquired under s. 8 of the said Act there would still be a lapse of time between the Government Gazette and the actual registration of the notice with the relevant registering authority under s. 9 of the said Act. Mr. Ho also referred to the evidence of the three lawyers called by the plaintiffs regarding the practice of solicitors here and pointed out that the introduction of an enquiry form such as Exh. P1 showed that it was a prudent practice before as well as at present to make the relevant enquiries with the respective land offices. Counsel then referred to the following dictum of Lord Fraser of Tullybelton in the House of Lord's case of *Whitehouse v. Jordan* [1981] 1 All ER 267, 281:

> The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence.

and submitted that the defendant had not passed the test laid down in that dictum.

Counsel for the plaintiffs then submitted that the defendant was also liable for breach of contractual duty, and like Mr. Lim, he also referred the Court to the *Midland Bank Trust Co. Ltd.* [1949] 2 All ER 964 case. He contended that that case clearly established that a solicitor was liable to his client (a) in negligence and (b) in contract for breach of contractual duties. In that case, Oliver J in the Chancery Division of the High Court in England had held, *inter-alia*, that the solicitors were liable to the plaintiffs in tort because under the general law and relationship of solicitor and client gave rise to a duty on a solicitor to exercise that care and skill on which he knew that his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do. Furthermore, there was no rule of law which confined a solicitor's duty to his client under his retainer to a contractual duty alone; nor was there any rule of law which precluded a claim in tort for breach of a duty to use reasonable care and skill if there was a parallel contractual duty of care.

Mr. Ho also submitted, as regards the contractual duty of the defendant, that to get the purchaser on the register was not the only duty of a solicitor in such a case and relied on *Lake v. Bushby & Anor.* [1949] 2 All ER 964. In that case the defendants were solicitors engaged by the plaintiff for the purchase of a property including a bungalow which had been erected by the Air Ministry and which he intended to convert into a dwelling house.

In reply to a requisition for an official search in respect of the property the solicitors received a letter from the local Council stating that no plans had been approved for a bungalow referred to in the requisition. The solicitors did not inform the plaintiff, i.e. the purchaser, who completed the purchase without knowledge that no plans had been approved for the bungalow and that the local authority might require the bungalow to be pulled down. The Court held that the solicitors' duty was to communicate the information to the prospective purchaser and not merely to see that he obtained a good title, and, having failed to do so, they were liable in an action for damages for negligence. The Court also held that the measure of damages was the difference between the value of the property as it stood with a "secure" building, and its value as diminished by the possibility that the local Council might require the building to be pulled down.

Mr. Ho concluded his submission by contending that the defendant could not rely on the failure or delay of the Registrar of Land Titles to register the notice under s. 8 of the Land Acquisition Act in accordance with s. 9 of the said Act. Assuming that the Registrar of Land Titles was negligent, it was the contention of Counsel that it was not a defence to the plaintiffs' suit to rely on the negligence of third party (Halsbury's *Laws of England* (4th Edn..) Vol. 34 para. 77 at p. 64.)

It is clear and settled law that a client of a solicitor may bring an action against him in contract, based on the retainer of solicitor by the client, or in tort, or in both (*Nocton v. Lord Ashburton* [1914-15] All ER 45, 54 and the *Midland Bank Trust Company Limited case*). As regards the obligations arising out the retainer, a solicitors' duty is to use reasonable care and skill in giving such advance and taking such action as the facts of a particular case demand. The standard of care is that of the reasonably competent solicitor and the duty is directly related to the confines of the retainer. The exact scope of the solicitor's duty to protect his client's interest is difficult to define but according to Scott, LJ in *Groom v. Crocker* [1938] 2 All ER 394 at 413, a solicitor should at least

> carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary ...

The present case involved the purchase of a piece of vacant land and was non-contentious business. There is no statute or rule prescribing the regular method for a solicitor to carry out his duty in such a matter and in judging this case I followed the above-quoted passage on "Standards of Comparison" in Phipson on *Evidence* (12th Edn.) On the question involving the negligence or otherwise of the defendant in the circumstances of this case I therefore considered that the general practice of some of the solicitors here would afford a measure by which the conduct of the defendant may be gauged. Bearing in mind that the evidence of the three advocates and solicitors who gave evidence for the plaintiffs did not bind me as a judge of fact regarding the legal standard by which the defendant's conduct should be judged, yet I considered that their evidence was of guidance to the Court in deciding this matter. Having considered the evidence adduced in this case I considered and found as a fact that the defendant had failed in his duty to use reasonable care and skill in giving his advice and taking such action as the facts of this particular case demanded of a normally competent and careful practitioner here.

> I considered that apart from a search in the Interim Register he should have also, like other normally competent and careful solicitors, concerned.

In the circumstances of this case I considered that he was therefore liable to compensate his clients for the loss caused by his breach of contractual duty as their solicitor. As regards liability in tort, the defendant was a professional man professing special skill who gives assistance to another and owed a duty of care, quite independent of contract, to that other person or persons who to his knowledge relied on his skill (the *Midland Bank Trust Company Limited* case; *Hedley Bryne and Company Ltd v. Heller and Partners Limited* [1963] 2 All ER 575). He was consequently also liable for negligence in the circumstances of this case and for the reasons stated, I therefore gave judgment for the plaintiffs and ordered the defendant to pay them a sum of RM31,000 together with interest at the rate of 6 per cent per annum from the date of the writ to the date of payment or realisation and costs.

Also found at [1983] 2 CLJ 218